MEHAMUD NYAK AHMAD & ANOR A

v.

TUFAIL AHMAD ALARAKHA & ORS

HIGH COURT MALAYA, ALOR STAR B
MOHD SOFIAN ABD RAZAK J
[ORIGINATING SUMMONS NO: 24-883-2003]
14 JULY 2008

CIVIL PROCEDURE: *Stay of execution - Application for - Application for stay of proceedings pending trial disposal of appeal - Special circumstances - Whether established - Whether application for stay allowed* C

This was the respondents' application for, *inter alia*, all proceedings against the respondents arising from the court order dated 28 September 2004 including the proceedings in respect of assessment of damages before the deputy registrar on 19 January 2005 be stayed pending the trial disposal of the respondents' appeal before the Court of Appeal. The proceedings by the applicants against the respondents was for the removal of the private caveats on certain pieces of land which was allowed by the court and damages for wrongful entry of caveats be assessed before the learned senior assistant registrar. The respondents stated that there were special circumstances which warranted a stay of proceedings to be granted such as the respondents' appeal before the court of appeal have not been heard and if the appeal was successful, the outcome would be nugatory. The applicants, in objecting to the application, contended that the averments by the respondents disclosed no triable issues and that there were no special circumstances which warranted a stay. The issue that arose was whether the balance of convenience or the balance of justice was in favour of the respondents or the applicants. D E F G

Held (allowing respondents' application for stay): H

(1) Applying the special circumstances approach to the facts of the case herein, this court was satisfied that on affidavit evidence the respondents have succeeded in showing that there existed special circumstances to warrant a stay of execution or proceedings in the instant case. If no stay was granted, the properties would have been transferred to a third party resulting in the respondents not being able to get I

properties at all from the applicants despite having made full payment of the purchase price to the applicants. Whether the respondents would be able to argue their case was for the Court of Appeal to decide. The respondents have successfully thrown to the court the existence of special circumstances in their application for a stay of proceedings pending appeal.

Case(s) referred to:
Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***
Government of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***
Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1996] 1 MLJ 86 ***(refd)***
Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***
Perwira Affin Bank Bhd v. KI Production Sdn Bhd [2000] 4 CLJ 482 HC ***(refd)***
Salim Ismail & Ors v. Lebbey Sdn Bhd [1997] 1 CLJ 98 CA ***(dist)***
See Teow Guan & Ors v. Kian Foo Holdings Sdn Bhd [1997] 2 CLJ 299 CA ***(refd)***
Serangoon Garden Estates Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
The Topps Co Inc v. Mally Jaya Sdn Bhd [1998] 2 CLJ Supp 235 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Rules of the High Court 1980, O. 56 r. 1(4), O. 92 r. 4

Other source(s) referred to:
Halsbury's Law of England, 4th edn, vol 17, para 455

For the applicant - M/s Idris & Assoc
For the respondent - M/s Presgrave & Mathews

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Sofian Abd Razak J:

[1] This is the respondents' application (encl. 45) dated 4 December 2005. In the said application, the following reliefs prayed are namely:

(a) That all proceedings against the respondents arising from the court order dated 28 September 2004 including the proceedings in respect of assessment of damages (encl. 40) before the Deputy Registrar on 19 January 2005 be stayed pending the trial disposal of the respondents' appeal before the Court of Appeal.

(b) Costs.

(c) Any other reliefs deem fit and proper by the Honourable Court in the circumstances.

[2] The proceedings by the applicants against the respondents is for the removal of the private caveat No: 70/2003, No: 347/2003 and No: 417/2003 lodged on Lot No: 29 and 31 Mukim Kuah, Padang Lalang, Langkawi, respectively. The applicants' application to remove the said private caveats was allowed by the court on 28 September 2004 and damages for wrongful entry of caveats be assessed before the learned senior assistant registrar and was fixed for hearing on 19 January 2005.

[3] The respondents stated in the affidavit in support (encl. 46) that there are special circumstances which warrant a stay of proceedings be granted. The special circumstances *inter alia* are as follows namely:

(a) that a notice of appeal has been filed before the Court of Appeal on 11 October 2004 and the respondents are still awaiting the notes of evidence and grounds of decision.

(b) that there are merits in the appeal as per the brief written submission dated 26 Mac 2004 and 7 August 2004, respectively.

(c) that the applicants' claim is frivolous and without any merit.

(d) that the respondents' appeal before the Court of Appeal have not been heard and if the appeal is successful, the outcome would be nugatory.

(e) that if the application for stay of execution is granted, it would save the Honourable Court's valuable time in the hearing for the assessment of damages.

(f) that the second applicant is in a bad financial state and the third applicant is not in the position to pay any costs or damages ordered by the court for damages suffered by the respondents on being successful in the appeal.

(g) that the failure of the second applicant to redeem the Plots was due to their own mismanagement of the financial affairs and not due to the caveat entered.

(h) that despite the payment by the respondents of the sum of RM391,000 to the second applicant, the respondents have still not been given the title to the said properties.

(i) that the house belonging to the third respondent had been fraudulently sold and charged to a third party.

[4] In the affidavit in reply *vide* (encl. 58) affirmed by Muhammed Ali bin Mohd Idris where the applicants averred as follows:

(a) that the applicants denied that the assessment of damages is without any merit.

(b) that the applicants had been verily advised by solicitors that there are no merits in the appeal.

(c) that the respondents have no caveatable interests on the said land.

(d) that the failure to obtain the title to the said land was not caused by the applicants but the registration was rejected by the land office on grounds that the respondents were not entitled in law to acquire Malay reserved land.

(e) that the applicants denied disposing off the house belonging to the third respondent unlawfully. The third respondent had failed to pay the instalment and therefore the sale and purchase agreement between the third respondent and the second applicant was terminated.

[5] The respondents filed further afidavit (encl. 64) where it was stated *inter alia* as follows:

(i) that at the time Muhammed Ali bin Mohd Idris affirmed the affidavit in reply (encl. 58) he was already adjudged a bankrupt *vide* Bankruptcy No: 43-29-1999 on 27 April 2000 and Bankruptcy No: 43-2797-2000 on 22 May 2003 respectively.

In this regard, the deponent had no legal capacity to affirm the affidavit in reply (encl. 58) without the leave of the official assignee. The deponent also had no authority to affirm encl. 58 on behalf of the other applicants. A

(ii) that both the directors of the second applicant were adjudged as bankrupt and their interest in the shares of the second applicant is vested in the official receiver and the shareholders had no authority to appoint directors to manage the second applicant. B

(iii) that all the transactions after the second applicant had been made a bankrupt are unlawful and null and void, therefore will viatiate all the transactions entered into by the second applicant. C

(iv) that the second applicant had failed to exhibit any resolution appointing Messrs. Idris & Associates as their solicitors and En. Vazeer Alam Mydin Meera as counsel. D

[6] The court on 18 October 2006 after perusing the written submissions filed herein and hearing oral submissions by both parties, allowed the respondents' application for stay of execution (encl. 45) with costs. The applicants who were dissatisfied with the said decision have since filed an appeal. E

[7] I will now address briefly the issues of the merit of the respondents' case and whether there are special circumstances to justify a stay pending appeal. F

Factual Matrix Of The Case

[8] The applicants filed an application (encl. 1) against the respondents for the removal of private caveats entered in respect of properties held under HS(M) 90/85, Plot 29, HS(M) 92/85, Plot 31, Mukim Kuah, Padang Lalang, Langkawi, Kedah, respectively. The hearing of encl. 1 was heard before another High Court Judge. G H

[9] On 28 September 2004, the learned judge after reading the written submissions filed herein and also after hearing oral submissions by both parties allowed the applicants' application (encl. 1) with costs and for damages to be assessed for wrongful entry of caveats. The respondents who were dissatisfied with the said decision have since filed an appeal. I

[10] The respondents are still awaiting the receipt of the notes of evidence and the grounds of decision from the learned judge. In the meanwhile, the applicants have filed an application for assessment of damages before the Deputy High Court Registrar (encl. 40) which is fixed for hearing on 19 January 2005.

[11] Before me, the learned counsel for the respondents contended that there are special circumstances to justify a stay of proceedings. At the risk of repetition, the special circumstances referred to by the learned counsel for the respondents are in essence what were stated in the affidavit in support (encl. 46) and the further affidavit (encl. 64), respectively.

[12] The learned counsel for the applicants, in objecting to the application, contended that the averments as stated in encl. 46 and encl. 64 disclosed no triable issues and that there are no special circumstances which warrants a stay.

[13] The learned counsel for the applicants denied that the claim against the respondents are without merits based on the fact that the court had on 28 September 2004 allowed the applicants' application to remove the caveat entered on the said land.

[14] The issues mentioned in the respondents which according to the applicants are not special circumstances are namely:

(i) that O. 56 r. 1(4) Rules of the High Court 1980, states that an appeal does not operate automatically as a stay of execution.

(ii) the applicants deplorable state of financial affairs.

(iii) that O. 92 r. 4 RHC 1980 is inapplicable as it is a general provision and not specifically meant for the stay of proceeding with regard to hearing of assessment for damages. Reference is made by the learned counsel to s. 73, Courts of Judicature Act 1964.

(iv) that hearing of the assessment for damages would be a waste of valuable court's time, if the respondents were successful in their appeal. To this, the learned counsel for the applicants submitted that if the hearing of the assessment for damages is proceeded and if the respondents failed in their appeal, the case would not have to be remitted for assessment of damages to be done. This would save the court's valuable time.

(v) with regard to the fact that the deponent to encl. 58 is an undischarged bankrupt, the learned counsel referred to the case of *The Topps Co. Inc. v. Mally Jaya Sdn. Bhd* [1998] 2 CLJ Supp 235 where Low Hop Bing J (as he then was) held 'The mere fact that a deponent is an undischarged bankrupt does not deprive him of any legal competency in affirming an affidavit in support of the *ex parte* application for use in any proceedings.'

(vi) that the need to exhibit a resolution showing that the firm of Messrs. Idris & Associates and En. Vazeer Alam bin Mydin Meera have been appointed by the second applicant to represent the applicants. The learned counsel submitted that these information is privilege information between solicitor and client and cannot be disclosed.

The Law On Stay Execution And Or Proceedings

[15] There are no dearth of authorities and judicial pronouncement made by the courts when considering an application for stay. The two common approaches which are usually adopted by the courts would be the special circumstances approach and the nugatory approach. The question to be asked is whether both the approaches are mutually exclusive or whether they are intertwined and requires both approaches to be considered when granting or refusing a stay.

[16] In the case of *Government of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 and in *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161, the Supreme Court and the Federal Court respectively, adopted the special circumstances approach.

[17] In both cases, the apex court stated that it is entirely for the court to decide, on the evidence before it, what circumstances on its opinion constitute special circumstances. In a nutshell, special circumstances must mean something out of the ordinary or something unusual.

[18] In the case of *Leong Poh Shee v. Ng Kat Chong* [1996] 1 MLJ 86, Raja Azlan Shah (as HRH then was) described "special circumstances as the term implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character something that exceeds or excels in some way that which is usual or common. The list of factors which constitutes special circumstances is infinite."

[19] In so far as the nugatory approach is concerned, it is discussed in the context of the applicant being successful in his appeal and it would not be rendered futile. In the *Serangoon Garden Estates Ltd v. Ang Keng* [1953] MLJ 116, the court made reference to special circumstances in considering the stay application and it also indirectly referred to the nugatory approach and the merits of the appeal requirement as district and mutually exclusive to one another in that one without the other would not be sufficient to constitute special circumstances in order to justify a stay.

[20] The Court of Appeal in *Teow Guan v. Kian Foo Holdings Sdn Bhd* [1997] 2 CLJ 299 adopted the nugatory aprpoach when it considered the stay application.

[21] In the case of *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465 where Azmel Maamor J (as he then was) delivering the judgment of the Court of Appeal held as follows:

> It is now a well established principle that in an application for a stay of proceedings the applicant must show the existence of special circumstances. This principle was originally adopted in the case of *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. The Court of Appeal in the case of *See Teow Guan & Ors v. Kian Foo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 ruled that there is no need for the applicant to demonstrate special circumstances to warrant a stay of proceedings or of execution. However, the recent Federal Court ruling in the case of *Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 appears to have overruled the decision of *See Teow Guan*'s case and reinstated the principle that was established in the *Serangoon Garden Estate*'s case whereby the applicant is still required to show special circumstances in an application for stay of proceedings or execution. We are therefore bound by the ruling of the Federal Court.

[22] In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, the Federal Court refused a stay as the applicants failed to establish special circumstances. It is pertinent to note what Augustine Paul JCA (as he then was), in delivering the judgment of the Federal Court in the *Kosma Palm Oil*'s case said of special circumstances and of nugatoriness with reference to *See Teow Guan v. Kian Foo Holdings Sdn Bhd (supra)*.

It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related. See *Teow Guan & Ors v. Kian Foo Holdings Sdn Bhd & Ors* could have withstood scrutiny if it has merely referred to nugatoriness without rejecting special circumstances. As nugatoriness is a species of special circumstances, a mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds on which an application may rely. Learned counsel for the applicants is therefore wrong in submitting that the nugatory approach is not a matter for consideration in this case as what is relevant is only the special circumstances. He would have been correct if he had said that he was not relying on nugatoriness but on some other species of special circumstances.

Findings Of The Court

[23] The law relating to the granting of stay of execution/proceeding is settled. The court has an absolute and unfettered discretion in its inherent jurisdiction powers as to the granting or refusing a stay and as to the terms upon which it will grant it and will, as a rule only grant it if there are special circumstances which must be deposed to an affidavit unless the application is made at the hearing (see *Halsbury's Law of England* (4th edn.) vol 17 para 455).

[24] In dealing with the inherent jurisdiction of the court, O. 92 r. 4 of the RHC 1980, which preserves the inherent powers of the High Court to prevent injustice or to prevent an abuse of the process of the court.

[25] Order 92 r. 4 of the RHC 1980 is reproduced as follows:

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[26] The court agrees with the submission made by the learned counsel for the applicant that a stay would not be granted simply because there is an appeal to the Court of Appeal.

[27] Section 73, of the Courts of Judicature Act 1964 stated as follows:

> An appeal shall not operate as a stay of executions or of proceedings under the decision appealed from unless the Court below or the Court of Appeal so orders and no interrmediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[28] In the case of *Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366, NH Chan J (as he then was) in considering the scope and applicability of s. 73 of Act, stated that the validity or the correctness of a judgment is not the concern of the court. In *Kosma Palm Oil Mill Sdn Bhd (supra)*, the court also held that merits of the case is irrelevant but what is relevant is the effect of the enforcement of the order or judgment.

[29] Having stated briefly the law in relation to a stay application, the court will now embark to examine what are the special circumstances as deposed to in the affidavits in support (encl. 46) and further affidavit (encl. 64) respectively. From reading both the affidavit in support (encl. 46) and further affidavit (encl. 64) respectively, the special circumstances as alleged concerned, the entry of three (3) private caveats on properties held under HS(M) 90/85, Plot 29 and HS(M) 92/85, Plot 31, Mukim Kuah, Padang Lalang, Langkawi, Kedah, respectively.

[30] The second application was at all material time the developer of the said properties. It was alleged that the first and second respondents have paid the full purchase price in respect of Plot 27, 28 and 30 respectively and the applicants are holding the said properties on trust for the first and second respondents respectively.

[31] It was further alleged by the respondents that the applicants having received the full purchase price from the respondents had failed to redeem the said properties from the bank and transfer them to the respondents which could only be done by disposing of the properties namely Plot 29 and Plot 31. The respondents claimed that they have a caveatable interest to caveat the said Plot

29 and 31 respectively. At this juncture, the court is not concerned with the correctness or the validity of the order made by the learned judge on 28 September 2004 in removing the private caveats entered by the respondents but the effect of the said order.

[32] The respondents also referred to the legal status of the deponent to the affidavit in reply (encl. 58) for the applicant namely Muhammed Ali bin Mohd Idris who was an undischarged bankrupt at the material time. Again the court is not going to decide whether the said deponent who was an undischarged bankrupt could be permitted in law to affirm the said affidavit in reply. The respondents averred that there was no disclosure that the deponent was an undischarged bankrupt but only mentioned that he was an ex-director. Both parties have cited the relevant case law and the provisions of the Bankruptcy Act and Rules respectively to fortify their respective arguments.

[33] In my view the difficult decision the court has to make is to strike a judicial and equitable balance between applicants who are the successful party in the litigation and ought to be allowed to reap the fruits of its litigation and respondents herein being the unsuccessful party in litigation and the prospect of being successful in the appeal rendering the outcome of the case nugatory. It is the duty of the court to look at the evidence and decide whether the balance of convenience or the balance of justice is in favour of the respondents or the applicants.

[34] A careful reading of the facts and decision in *Kosma Palm Oil Mill Sdn Bhd (supra)* makes no mention of whether the balance of convenience approach was considered. By implication, if it was not mentioned then the special circumstances approach stands.

[35] Applying the special circumstances approach to the facts of the case before the court, the court was satisfied that on affidavit evidence the respondents have succeeded in showing that there existed special circumstances to warrant a stay of execution or proceedings in the instant case.

[36] In this regard, there is a possibility that if no stay is granted the said properties held under HS(M) 90/85, Plot 29 and HS(M) 92/85, Plot 31, Mukim Kuah, Padang Lalang, Langkawi, Kedah would be disposed off even before its heard.

[37] In the case of *Perwira Affin Bank Bhd v. KI Production Sdn Bhd* [2000] 4 CLJ 482 where the brief facts are that the defendant filed an application for a stay of proceedings pending the disposal of its appeal to the Court of Appeal against a previous decision of the High Court ordering the sale of the land it had charged to the plaintif bank. The defendant contended that the special circumstances here was that land always has a special value and that its appeal, if successful, would be rendered nugatory if a stay was refused and the plaintiff proceeded to auction off the land.

[38] RK Nathan J held that land has a special value of loss which may not be adequately compensated by damages. This 'circumstance' should be considered even in the context of an application for stay within foreclosure proceedings. The defendant must also show and indeed had shown it has a strong possible success on appeal.

[39] His Lordship in *Perwira Affin Bank Bhd (supra)* also cited the case of *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476 where Edgar Joseph Jr SCJ (sitting as a High Court Judge) held that 'land is always deemed to have a special value of loss which may not be adequately compensated by damages'.

[40] In the Federal Court, Edgar Joseph Jr SCJ in the case of *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 at p. 26 said 'not forgetting that land is always deemed in law to have a special value and is in the nature of things, absolutely limited'.

[41] And in *Salim bin Ismail & Ors v. Lebbey Sdn Bhd* [1997] 1 CLJ 98 where the facts are distinguishable with the facts in the instant case, as it involves an application for stay of execution against an order for summary eviction obtained against the applicants. The applicants applied for stay of execution until their claims is disposed off in full trial. The court also had to consider whether damage can be adequately compensated if stay is refused. The Court of Appeal held that the destruction of the applicants' right to stay in their homes until their claims had been finally disposed of in a full trial could not be adequately compensated with money. The court further also held that this was a special reason why a stay should be granted.

[42] Reverting to the facts of the instant case, there can be no doubt that if no stay is granted, the properties held under HS(M) 90/85 Plot 29 and HS(M) 92/85 Plot 31, Mukim Kuah, Padang Lalang, Langkawi Kedah would have been transferred to a third party resulting in the respondents not being able to get properties at all from the applicants despite having made full payment of the purchase price to the applicants. Whether the respondents will be able to argue their case is for the Court of Appeal to decide.

[43] I am of the view that the respondents have successfully shown to the court the existence of special circumstances in their application for a stay of proceedings pending appeal. In exercise of my discretion, I hereby allowed the respondents' application for stay (encl. 45) and costs in the cause.